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No. 07-1607

IN THE

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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United States Environmental Protection Agency, *Final National Priorities List (NPL) Sites—By State, available at* http://www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm 17

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 125 corporate members (including Shell Oil Company, the Petitioner here) representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief.

INTRODUCTION

The Ninth Circuit held a product manufacturer liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for having "arranged for disposal . . . of hazardous substances" because a commercial carrier, after the sale of the product, unintentionally spilled a minute portion of the product at the buyer's facility. Based on this tenuous connection, the Ninth Circuit held the manufacturer jointly and severally liable for all of the contamination at the site—including contamination from products never manufactured or sold by the company. As the eight judges who dissented from the Ninth Circuit's denial of *en banc* review declared, the panel's decision is "novel and unprecedented." *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 952 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's decision warrants this Court's attention. The Ninth Circuit's interpretation of CERCLA cannot be squared with the text of the statute. Rather than interpreting the statute according to its ordinary meaning, in deference to the common-law and with disfavor toward retroactive laws, the Ninth Circuit imposed limitless and uncontrollable liability for manufacturers, without any indicia of congressional intent. The Ninth Circuit's distortion of the meaning of "arranger liability" is modern alchemy, transmuting languages of limitation into a pot of gold for the Government.

Moreover, as the petition for certiorari filed by Shell Oil Company sets forth, the Ninth Circuit's decision creates a split of authority among the courts of appeals in an area of law where national uniformity, as both the panel and the dissent from

rehearing en banc concede, is critically important. *Id.* at 935-36; *id.* at 952 (Bea, J., dissenting from denial of rehearing en banc). The courts of appeals have struggled to no avail for almost three decades to find a common definition of arranger liability. Without this Court's intervention, the steady, incremental expansion of liability far beyond the language or purpose of the statute is likely to continue. This Court should grant Shell's petition for certiorari and should reverse the Ninth Circuit.

BACKGROUND

Shell did not own or operate the facility that is now a Superfund Site. It did not dispose of hazardous substances there. Shell's only connection to the contaminated facility in question was as the manufacturer and seller over a number of years of the soil fumigant D-D, which is used to kill microscopic worms that attack the roots of crops. The D-D sold here was not a waste product, but a valuable and useful commercial product used safely by farmers for decades. D-D was transported to the facility here by common carrier trucks, FOB destination. A condition of sale was that the buyer was responsible for the product when it arrived at the facility. *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, Nos. CV-F-92-5068, *et al.*, 2003 WL 25518047, at *5 (E.D. Cal. 2003) (citing Ex. 1199, Conditions of Sale, at 7, section 3).

The district court, sitting as the factual finder, found the only release remotely connected to Shell was from occasional drips and spills of D-D during commercial carriers' transfer of the product at the buyer's facility. Shell was aware that drips were likely and provided instructions to the buyer for safe

handling. While the district court found that some drips during the transfer into the buyer's storage tanks were unavoidable, it concluded that the drips were usually captured as they occurred in five-gallon buckets. *Atchison*, 2003 WL 25518047, at *20. The process of transferring D-D from delivery trucks to the operator's tanks resulted in small quantities of D-D reaching the ground when the carrier or buyer failed to secure or tipped over the buckets. *Id.* at *21, *22. Moreover, the district court found that even when D-D was spilled, the product would harmlessly evaporate from the soil unless water was present. *Id.* at *9, *13. Significantly more spills, leaks and contamination, however, were due to the operator's subsequent transfer and uses of D-D and other chemicals. *Id.* at *5-9. Here, it is undisputed that 99% of the chemical mass in the groundwater was from the waste pond and sump where the operator rinsed its equipment. *Id.* at *12. Shell had no connection to this contamination source. The court found that the facility owner "was a sloppy operator." *Id.* at *26.

Over the course of several years, the EPA performed both removal and remediation at the site and sought cost recovery from Shell. Although it is acknowledged that any contamination created by spilled buckets during the transfer of D-D into the buyer's storage tanks were at most a minor contribution to the contamination, the EPA sought to hold Shell jointly and severally liable for the entire cost of the removal and remediation, including products never sold by Shell. Expanding Ninth Circuit precedent, which already espoused a "broad" application of arranger liability, the district court

found Shell liable, but limited damages to an approximate determination of Shell's contribution.

The Ninth Circuit, distinguishing its own inconsistent precedents and finding refuge in its talismanic reference to further the undefined remedial goals of CERCLA, imposed joint and several liability on Shell. Without explaining or adopting a standard of arranger liability, the court stated that under its precedent the seller of a new product can be an arranger under CERCLA "even if it did not intend to dispose of the product." *Burlington*, 520 F.3d at 949. The court also held that neither control nor ownership at the time of disposal is required, but that such factors are merely "useful indices or clues" for the court to examine. *Id.* at 951. Here, because Shell owned the product at the time of the sale (although not at the time of the drips), hired a carrier to deliver the product, knew that drips would occur, and provided product instructions for safe handling, arranger liability was held to be appropriate. *Id.*

Judge Bea wrote a vigorous dissent from the court's denial of rehearing en banc because "the panel's broad definition of arranger liability . . . impose[s] CERCLA liability where Congress did not intend." *Id.* at 963 (Bea, J., dissenting from denial of rehearing en banc). The dissent contended that "[b]y imposing arranger liability on a mere seller, the panel stretches the meaning of arranger liability beyond any cognizable limit and creates inter-circuit splits." *Id.* at 961. The dissent recognized that the panel's expansive definition of arranger liability will force product manufacturers to become insurers not only of their products, but also of the sites through

which the products may travel, long after the seller has relinquished control. *See id.* at 963.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT MISINTERPRETED CERCLA AND DISRUPTED PREEXISTING LAW.

1. CERCLA is a broad, although not limitless, statute. CERCLA creates strict liability for specified classes of persons and applies retroactive liability to those individuals within its reach. CERCLA allows recovery of the total costs of remediation for conduct that may have occurred many decades before. Oftentimes, that liability for clean-up costs is joint and several, imposing millions of dollars of liability on a few still solvent defendants, even though each defendant's contribution was comparatively minor.

CERCLA liability, however, is not and was not intended to be imposed indiscriminately. Congress specifically limited the actors who could be held liable to four classes of persons, including "any person who by contract, agreement, or otherwise *arranged for disposal* . . . of hazardous substances . . . ." 42 U.S.C. § 9607(a)(3) (emphasis added). Without these limitations on persons potentially liable, CERCLA liability literally would be unlimited.

In interpreting CERCLA, this Court has turned to the plain meaning of the statutory language. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Court interpreted the contribution provision of the amended statute to adopt the "natural meaning of th[e] sentence" that contribution may only be sought subject to the specified conditions. *Id.* at 166. When both parties argued that the purpose of CERCLA bolstered its

reading of the provision, this Court stated that "[g]iven the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all." *Id.* at 167 (also quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").[2]

Likewise, when faced with the meaning of "operator" liability under CERCLA, this Court looked to the "ordinary or natural meaning" of the term. *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Consulting the American Heritage and Webster's New International Dictionaries, the Court concluded that "an operator is simply someone who directs the workings of, manages or conducts the affairs of a facility" and in a CERCLA context, "an operator must manage, direct, or conduct operations specifically related to pollution." *Id.*; *see also United States v. Atl. Research Corp.*, ___ U.S. ___, 127 S. Ct. 2331, 2336, 2339 (2007) (holding that under CERCLA the "plain language . . . authorizes cost recovery actions by any private party, including [Potentially Responsible Parties]").

The ordinary or natural meaning of the statutory language here precludes a company like Shell from

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[2] In fact, one's view of the "purpose" of CERCLA depends on the eye of the beholder. It can be used either to support limitless expansion of liability beyond the terms of the statute itself in furtherance of broad environmental goals, or to support a limitation of liability to those situations that prompted the legislation itself, classic disposal sites like Love Canal. Consequently, reference to the "purpose" of CERCLA begs the question.

being held liable as an "arranger." The operative phrase—"arranged for disposal"—requires purposeful action. According to the American Heritage Dictionary of the English Language, the word "arrange" means "to plan or prepare for." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE: FOURTH EDITION 99 (2006); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 120 (2002) ("arrange" means "to make preparations" to "plan"). The word "for" is used to "indicate the object, aim, or purpose of an action or activity." AMERICAN HERITAGE DICTIONARY: FOURTH EDITION 686; *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 886 ("For" means "as a preparation toward."). In other words, the language of the statute literally requires the defendant to have made plans with the purpose of disposal.

The language cannot be read, as the Ninth Circuit held, to allow liability for a person who sold a product—not for the purpose of disposal, but for productive and permitted uses—where the common carrier or operator accidentally spilled some amount of the product at the buyer's facility. Although unintentional spills can constitute "disposal," Congress limited liability to those who " 'arrange for' such disposal (not just arranged for the sale)." *Burlington*, 520 F.3d at 961 (Bea, J., dissenting from denial of rehearing en banc). If one is to give the words "arrange for" any meaning, as the Court must, there must be a purposeful intent to dispose, not merely knowledge that some product may not be used as intended.[3] *See, e.g., Cooper Indus.*, 543 U.S. at

[3] It is difficult to see how the fact that "disposal" includes unintentional spillage has any relevance to this case. The drips from the transfer itself did not cause any contamination, as the

166 (rejecting, in CERCLA context, a "reading [that] would render part of the statute entirely superfluous, something we are loath to do"); *Rake v. Wade*, 508 U.S. 464, 471 (1993) ("To avoid 'deny[ing] effect to a part of a statute,' we accord 'significance and effect. . . to every word.'") (citation omitted). As the dissent from rehearing en banc persuasively argues, "[i]t is an oxymoron for an entity *unintentionally* to make preparations for disposal." *Burlington*, 520 F.3d at 961 (Bea, J., dissenting from denial of rehearing en banc).

The Seventh Circuit addressed "arranger" liability in an almost identical situation as here, but followed the statutory language to conclude that a person who arranged for the sale and transport of a consumer product did not "arrange for disposal" of that product when some spilling occurred. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993). The court, in an opinion by Judge Posner, held, "Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises. Although the statute defines disposal to include spilling, the critical words for present purposes are 'arranged for.' The words imply intentional action." *Id.* The court concluded that although the defendant arranged for

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(continued...)

drips were collected in a bucket and then were supposed to be dumped into the storage tanks for use. The "disposal" of the product occurred only when the carrier or the buyer knocked over the buckets. Shell, however, had no involvement or connection with knocking these buckets over and cannot be said to have "arranged for" these buckets to be knocked over. Shell also had nothing to do with other "sloppy" practices of the operator that largely caused any contamination here.

the delivery of the product it did not arrange "for spilling the stuff on the ground" and therefore there was no arranger liability. *Id.* As the court held, "[n]o one arranges for an accident, except in the sinister sense, not involved here, of 'staging' an accident—that is, causing deliberate harm but making it seem accidental." *Id.* Other courts, likewise, have come to similar conclusions regarding the statute's language. *See, e.g., Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998) (no arranger liability because "intent" was not for the "treatment" of hazardous substances); *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) (arranger liability requires person to have "intended to enter into a transaction that included and 'arrangement for' the disposal of hazardous substances"). *But see United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (holding the manufacturer, who maintained ownership of the product throughout the processing that resulted in disposal (unlike Shell) liable regardless of intent to dispose).

The Ninth Circuit's opinion contradicts the plain language of the statute and the reasoned analysis of the courts that have required purposeful intent in arranging for disposal. Not only did the Ninth Circuit disavow any intent requirement for arranger liability, the court also rejected the notion that ownership or product control at the time of disposal was required. The Ninth Circuit did not attempt to articulate what the statutory language actually requires; "arranged for disposal" are words of limitation and definition read out of the statute by the Ninth Circuit analysis. The Ninth Circuit merely concluded that owning the product before the sale (as

every manufacturer necessarily does) and knowing that drips and spills may occur (which is why Shell advised that precautions be used) is enough to subject the manufacturer to liability. The extraordinary liability imposed under CERCLA should not be permitted on such a flimsy ground, unsupported by the statutory text.

The categories of covered persons under CERCLA are in fact limitations on liability and the plain language of the statute provides the possibility of at least one bright line rule for arranger liability. This Court should provide much needed predictability and uniformity in CERCLA jurisprudence by concluding that the sale of useful product is beyond the reach of arranger liability. The Court should grant certiorari and reverse the Ninth Circuit.

2. Even if a court were to conclude that the language of the statute is ambiguous and therefore subject to further interpretation, however, it should not expand arranger liability in a way that disrupts preexisting law and imposes retroactive liability without a clear expression of congressional intent to do so. Where a statute imposes harsh remedial consequences on persons within its purview, courts should strictly construe the individuals covered by the statute and not seek to expand its coverage beyond the explicit text. *See, e.g.*, 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61.3 (2001) (citing *In re W.W.*, 454 N.E.2d 207, 209 (Ill. 1983) (reasoning that a statute with remedial features should be strictly construed when determining what persons come within its operation)). The Ninth Circuit erred in construing the statute in favor of the Government and toward

more expansive liability, rather than with deference to the pre-existing law and rights of individuals.

First, the Ninth Circuit erred by failing to recognize the legal background under which CERCLA was drafted. As this Court has recognized, statutes are not drafted in a vacuum, but with knowledge of pre-existing legal principles. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Congress does not write upon a clean slate"). "'Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)) (ellipsis in original); *see also Viera v. Cohen*, 927 A.2d 843, 853 (Conn. 2007) ("[T]he operation of a statute in derogation of the common law is to be limited to *matters clearly brought within its scope.*") (emphasis added) (quoting *Matthiessen v. Vanech*, 836 A.2d 394, 405 (Conn. 2003) (quoting *Alvarez v. New Haven Register, Inc.*, 735 A.2d 306 (Conn. 1999); *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 928 (W. Va. 2007) ("[W]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.").

While CERCLA undoubtedly did derogate the common law in some important aspects, for example, imposing strict liability on current property owners regardless of intent or involvement, the Court cannot conclude that Congress derogated *all* common-law principles of liability. "In order to abrogate a

common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. at 534. To be sure, in *Bestfoods*, this Court has recognized in the context of CERCLA that Congress still must make clear its intention to abrogate specific common-law principles. *See Bestfoods*, 524 U.S. at 62 ("[N]othing in CERCLA purports to reject this bedrock principle, [that a parent corporation is not liable for the acts of its subsidiaries] and against this venerable common-law backdrop, the congressional silence is audible."). There, the Court held that a relaxed CERCLA-specific rule for derivative liability could not be imposed in derogation of common-law principles of liability. The Court held that the relaxed rule could not be read into the statute because it would "banish traditional standards and expectations from the law of CERCLA liability . . . . [S]uch a rule does not rise from congressional silence, and CERCLA's silence is dispositive." *Id.* at 70. *Cf. Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) (requiring congressional intent to alter the American rule that attorney fees related to litigation under CERCLA are not recoverable).

The common-law precursors to CERCLA, such as nuisance,[4] would not have countenanced liability to product sellers such as Shell. Common-law nuisance requires control over the product at the time any harm occurred. *See, e.g., Rhode Island v. Lead Indus. Ass'n, Inc.*, __ A.2d __, 2008 WL 2605396, at *15 (R.I. July 1, 2008) ("As an additional prerequisite to the imposition of liability for public nuisance, a

[4] *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 106-07 (1972) (noting that common-law public nuisance is used to regulate environmental pollution).

defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs.") (emphasis omitted); *see also* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3D § 27.6 (2007) ("[A] product manufacturer who builds and sells the product and does not control the enterprise in which it is used is not in the situation of one who creates a nuisance . . . .").

In addition, for liability to attach, a defendant's conduct must be "intentional and unreasonable" or "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) OF TORTS § 822 (1977 & Supp. 2008). There was no finding of any legal duty or reckless or dangerous activities by Shell in order to justify unintentional liability. Nor could there have been. Shell merely sold a product that was highly evaporative and provided guidance for safe handling. As there is no clear indication that Congress intended to change the common law and sweep product sellers like Shell into CERCLA under arranger liability, the court should have construed the statute in Shell's favor and not with an eye toward expanding liability.

Second, the Court should not interpret CERCLA arranger liability—which would apply retroactively—to apply to an expansive category of product sellers or manufacturers in the absence of specific congressional intent. As this Court has stated, retroactivity of legislation is disfavored and will not be applied unless expressly directed by Congress. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies

legal doctrine centuries older than our Republic. . . . [T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (footnote omitted) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Applying a statute retroactively "presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). These general anti-retroactivity concerns are heightened when the government's actions "affect[] contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271.

Although Congress may have been clear that it intended CERCLA to apply to prior acts of pollution, Congress was not clear that CERCLA would disrupt past commercial transactions such as the one at issue here. Imposing retroactive liability on a manufacturer as an arranger, where the manufacturer has merely sold and transferred its product without any intent for disposal, and no longer has ownership, possession, control, or further interest in the product, defeats the settled expectations of the seller. Shell transported the product in question FOB Destination and under an understanding that the buyer take responsibility for the product when it arrived at the facility. *Atchison*, 2003 WL 25518047, at *5. While Congress certainly has some power to disrupt the commercial expectations between the buyer and seller, courts should not assume that Congress intended to discard

these time-honored commercial principles and retroactively impose new burdens—particularly as the cost of liability under CERCLA is exorbitant.[5] *See Landgraf*, 511 U.S. at 284 (noting that the Court will not read a statute "substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment" when Congress had not clearly spoken). The Ninth Circuit should have construed the statutory language to avoid any retroactive concerns rather than in favor of the Government.[6]

In short, even if ambiguity exists in the statutory language, that ambiguity should be construed *against* sweeping in product manufacturers such as Shell under arranger liability. Such liability was

[5] In fact, Congress imposed specific taxes on chemical manufacturers, requiring them to make a contribution to Superfund. *See* 26 U.S.C. §§ 4611, 4661 & 4662. These provisions indicate that Congress did not intend to extend arranger liability to cover past typical sales transactions, but instead intended to recoup costs of environmental clean up through a direct levy. Had Congress intended to hold companies liable for the mere manufacture or sale of hazardous substances that were spilled in transit or during storage, it would have said so. There is no such category of CERCLA liability.

[6] Courts have concluded that CERCLA is within the limits of Congress's power because the imposed liability is proportionate and related directly to prior acts of pollution. *See Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 553 (6th Cir. 2001) (concluding that CERCLA's retroactive liability did not violate the Takings Clause because, as applied, the liability was "directly proportional to [defendant's] prior acts of pollution" and the defendant had expressly assumed liability for environmental harms) (emphasis added). Here, these outer limits of constitutionally permissible retroactive liability are being tested.

unknown under the common law and retroactively would foist mammoth and unexpected legal responsibilities on product manufacturers. These results should be presumed *not to occur* unless Congress specifically and clearly requires them, and it has not. The panel provides no justification to overcome these presumptions. This Court should grant the petition for certiorari and restore reason and logic on the Ninth Circuit's CERCLA jurisprudence.

II. THE COURT SHOULD GRANT REVIEW OF THIS CASE TO RESOLVE THE PERVASIVE CONFUSION ON AN ISSUE OF NATIONAL IMPORTANCE.

1. The Ninth Circuit's decision sets bad precedent in an area of immense national importance, the consequences of which will be far reaching. The Ninth Circuit, by far, covers the most land mass of any circuit, covering much of the Western United States. Within its boundaries exist almost 200 separate superfund sites. *See* United States Environmental Protection Agency, *Final National Priorities List (NPL) Sites—By State, available at* http://www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm. That is about 15% of the current Superfund sites in the country. *Id.*

The potential impact of this decision on the chemical manufacturing sector alone is staggering. There are 66,872 manufacturing establishments in the Ninth Circuit's geographical area. *2005 Statistics of Business—By States and Sectors, available at* http://www.census.gov/ (*follow* "Business & Industry"; *then follow* "Statistics of U.S. Business"; *then follow* "2005"; *then follow* "states, sectors"). The Ninth

Circuit's chemical manufacturing sector shipped $44 billion in 2006 (of the $657 billion shipped in the United States). *2006 Annual Survey of Manufacturers By State*, *available at* http://www.census.gov/ (*follow* "Business & Industry"; *then follow* "Annual Survey of Manufacturers"). Within the Ninth Circuit, 82,892 employees work in the chemical manufacturing sector, 11% of all chemical manufacturing employees in the United States. *Id.*

Not only are the millions of people and entities that are located in the Ninth Circuit subjected to the court's decision, but *every* person who sold *any* product to the owner or operator of these sites at *any* time *no matter what circuit in which they reside* may now be subject to CERCLA liability in the Ninth Circuit based on the sale of a product. This case, unlike the typical case, which is limited in some manner by time, circuit or industry, will have a ripple effect across the entire nation, imposing virtually unlimited and potentially ruinous liability.

Ramifications of this decision will disrupt commercial transactions, increase prices of necessary products, and impact insurance premiums. A product manufacturer who had only minimal contact with a facility could face millions of dollars of liability for a single clean up. For example, under the court's opinion, a company that sells a storage tank is potentially liable under CERCLA for "arranging for disposal" of a hazardous substance if it knows that the contents of the tank will inevitably drip and spill onto the ground. Additionally, the imposition of CERCLA liability that rests upon the practice of providing safety and handling instructions for

chemical products penalizes, rather than promotes, good business practices. *See Jordan v. S. Wood Peidmont Co.*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992), *aff'd*, 861 F.2d 155 (11th Cir. 1988) ("[I]mpos[ing] liability on a manufacturer on account of its dissemination of safety-related information is anathematic, even to the broad and salutary remedial purposes of CERCLA."). *Cf. R.R. St. & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 246 (Tex. 2005) ("Imposing arranger liability on chemical manufacturers and suppliers for providing technical services and advice will have the adverse effect of discouraging these companies from providing valuable advice to customers regarding the safe use and handling of their products."). This extraordinary liability under CERCLA based on the Ninth Circuit's expansive definition of arranger liability should not be haphazardly applied without guidance from this Court.

2. This case presents a good opportunity for the Court to clarify the scope of CERCLA arranger liability, as courts and commentators have been asking for years. *See* Roger K. Ferland & Marilyn D. Cage, *Using RCRA to Interpret CERCLA Liability: What is "Arranging For Disposal"?*, 23 ARIZ. ST. L.J. 445, 447 (1991) ("[T]he lack of guidance has resulted in a myriad of interpretations of "arranged for" liability that has been both inconsistent and confusing."); *see also* Sarah E. Stevenson, Casenote, *Broadening Arranger Liability Under Alaska State Law: The Ninth Circuit's Interpretation of* Berg v. Popham, 17 VILL. ENVTL. L.J. 477, 511 (2006) ("Interpreting arranger liability provisions has plagued both state and federal courts for the past twenty-five years."). As set forth in Shell's petition

for certiorari, the Ninth Circuit's decision conflicts with numerous courts of appeals, all of which have interpreted arranger liability in a more measured manner and none of which would permit arranger liability based on the sale of a product alone. But even among the courts that would reject the Ninth Circuit's expansive application of arranger liability, the courts of appeals are confused as to the scope and proper interpretation of arranger liability.

Courts have struggled to interpret arranger liability consistently since CERCLA was passed almost three decades ago. Some courts, unable to agree on a settled meaning, instead have promulgated non-exhaustive factors to examine. *See, e.g., Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003) (citing cases from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits in an attempt to set a standard). These non-exhaustive and non-dispositive factors have created a unique, ad hoc determination in every case so that outcomes vary from case to case and from circuit to circuit.

The Third Circuit, for example, adopted a standard that requires the plaintiff to demonstrate (1) ownership or possession, and (2) either knowledge or control. *Id.* at 677. But, the court also conceded that "[i]t is certainly possible that other factors could be relevant to this analysis in any given case, and we encourage consideration of those as well." *Id.* at 679; *see also United States v. Hercules, Inc.*, 247 F.3d 706, 721 (8th Cir. 2001) (declining to adopt a "bright-line" rule and instead examining the totality of the circumstances to determine whether the facts of a given case fit within CERCLA's scheme); *Fla. Power*

& Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1319 (11th Cir. 1990) (rejecting a per se rule in interpreting CERCLA liability). *See also* Stevenson, *supra*, at 497 (noting that to determine liability some courts will examine multiple factors including "strict liability, specific intent, totality of circumstances, obligation to control, and actual involvement"). As demonstrated by the Ninth Circuit's decision here, these ad hoc determinations tend to build on one another, leading the courts far afield from the statutory language itself.

Notwithstanding the courts' inability to agree on how to interpret arranger liability, the courts do agree that national uniformity in this area is absolutely necessary. *Burlington*, 520 F.3d at 935 (citing cases regarding the need for uniformity in application of joint and several liability under CERCLA). Uniformity is required to allow corporations and individuals to plan for and to protect against arranger liability. Under the *status quo*, it is impossible to determine whether one's conduct in selling a product could subject one to arranger liability—no small inconvenience considering CERCLA's harsh consequences—and impossible to tailor one's prospective behavior to accord with the law. Uncertainty and inconsistency will likely lead to unfair settlements and costly litigation. Guidance from this Court is necessary to provide a bright-line rule on this question. Further percolation would be useless, as the courts have shown no inclination or ability over the past twenty-eight years to agree on a definition of arranger liability; the courts simply cannot agree on how to interpret the statute.

The general confusion in an area of law of national importance and for which consistency and uniformity are paramount warrants this Court's attention. There are no vehicle problems, a full record with factual findings has already been made, and the Ninth Circuit's decision is an extreme outlier. A better opportunity for this Court to clarify arranger liability is unlikely to present itself.

CONCLUSION

The Court should grant Shell's petition.

Respectfully submitted,

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